

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOMMIE RAY BROWN,

Defendant-Appellant.

UNPUBLISHED

July 25, 2013

No. 310129

Kalamazoo Circuit Court

LC No. 2011-001900-FC

Before: MURPHY, C.J., and SAAD and SERVITTO, JJ.

PER CURIAM.

Defendant was convicted by a jury of domestic violence, MCL 750.81(2), and two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b. He was acquitted of a charge of felonious assault, MCL 750.82. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to 393 months to 60 years' imprisonment for each of the CSC I convictions and to 140 days' incarceration on the domestic violence conviction, all to be served concurrently. Defendant appeals as of right. We affirm.

This case stems from a brutal sexual assault by defendant against his "on and off" girlfriend. The evidence reflected that the victim was assaulted in a motel room, which was serving as her residence at the time of the attack. Defendant had previously lived in the motel room with the victim; however, he was no longer residing there at the time of the incident, although he still used the address for receiving mail. On November 20, 2011, defendant went to the motel room, he and the victim consumed some alcohol, and the victim then consented to perform fellatio. However, the victim proceeded to indicate that she could not do it and informed defendant that she was tired and wished to go to bed. Defendant then forcibly removed a ring from the victim's finger and threatened to flush it down the toilet if she did not consent to sex. When the victim became upset, defendant grabbed her cat, held it up by the scruff of the neck, and then "put a knife to [the cat's] belly[.]" at which point the victim started crying, begged defendant not to harm her cat, and agreed to capitulate to defendant's sexual demands. They began engaging in vaginal intercourse, but even then the victim tried to physically fend off defendant and cried out for help. As they struggled, defendant choked her and hit her on the side of the head with her cell phone, which knocked her to the floor. Defendant proceeded to have forced, nonconsensual vaginal intercourse with the victim, and he subsequently made her engage in nonconsensual anal intercourse, with the victim all along trying to physically fight off the attack and yelling for help. After the sexual acts were completed, defendant threw her on the bed

“and put the knife to [her] chest[,]” threatening to kill her. The victim testified that the first time defendant pulled out that knife it was to threaten its use against her cat and that the next time she observed the knife was after the sexual acts were completed and they were on the bed.

The two counts of CSC I, the act of vaginal intercourse and the act of anal intercourse, were predicated, in part, on the theory that defendant was armed with a weapon, the knife, at the time. See MCL 750.520b(1)(e) (sexual penetration under circumstances in which the actor is armed with a weapon).¹ The unsuccessful felonious assault charge was based on defendant placing the knife to the victim’s chest after the two acts of intercourse had been completed. Accordingly, the prosecutor asserted that a knife was utilized with respect to the CSC I charges and the felonious assault charge.

Defendant does not challenge the convictions on appeal. Rather, he solely argues that the trial court improperly scored offense variable (OV) 1, MCL 777.31, at 10 points instead of 5 points. We disagree that OV 1 should have been scored at 5 points. However, the score of 10 points was also in error, as the proper score is actually 15 points, taking into consideration the trial court’s conclusion that a knife was wielded during the criminal episode.

“If a minimum sentence is within the appropriate guidelines sentence range, [as is the case here,] the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant’s sentence.” MCL 769.34(10). “A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006), citing *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). “A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence,” and “[w]e review for clear error a court’s finding of facts at sentencing.” *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008), citing *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006), and *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). “Additionally, we review de novo as a question of law the interpretation of the statutory sentencing guidelines.” *Endres*, 269 Mich App at 417.

MCL 777.31, which pertains to OV 1, concerns the aggravated use of a weapon, providing as follows:

(1) [S]core offense variable 1 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

...

¹ The prosecutor’s alternate theory was that the sexual penetration occurred under circumstances in which defendant caused personal injury to the victim and force or coercion was used to accomplish the penetration. MCL 750.520b(1)(f).

(c) A firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon 15 points

(d) The victim was touched by any other type of weapon . . . 10 points

(e) A weapon was displayed or implied 5 points

The probation department scored OV 1 at 10 points. At sentencing, defendant argued that OV 1 should be scored at zero points because he was acquitted of felonious assault.² The following is the prosecutor's response to the argument and the trial court's ruling:

Prosecutor: Your Honor, the Court heard the testimony by the victim about the Defendant pulling and threatening her with a knife. I would leave that to the Court's discretion. I think it's indicated in the record by the proofs we heard at trial.

The Court: I agree and I think that the jury correctly acquitted the Defendant of the felonious assault because they felt that there wasn't evidence that he made an assault upon her but without intending to commit the crime of murder but I think that the proofs were pretty clear that there was a knife that was involved throughout the sexual assault so I'm going to find that OV 1 is supported for ten points but the objection is noted.³

Defendant maintains that the trial court found that defendant did not "assault" the victim with a knife; rather, according to defendant, the court essentially found that a knife was merely displayed, considering that the court only stated that a "knife . . . was involved." Stated otherwise, it is defendant's position that the trial court found that the victim had not been placed in reasonable apprehension of an immediate battery through the threatened use of the knife. Rather, the knife was only peripherally or indirectly involved by being displayed during the physical assault. Defendant therefore maintains that a score of 5 points is proper for OV 1 under § 31(1)(e).

We disagree with defendant's characterization of the trial court's ruling. Although awkwardly stated and a bit difficult to understand, we conclude that the more accurate interpretation is that the court believed that the felonious assault charge properly failed, not

² In a motion for remand, defendant argued, consistent with his argument on appeal, that OV 1 should have been scored at 5 points because a weapon was displayed or implied, thereby preserving the particular argument for appeal. MCL 769.34(10).

³ In addressing a different sentencing variable, the trial court mentioned that "the proofs did not convince the jury that the offense [of felonious assault] occurred." And the court noted its agreement with the jury's decision.

because there was no “assault” with a knife, but because there was inadequate proof of a mens rea showing an intent to commit the crime of murder. The problem with part of the court’s logic is, of course, that the crime of felonious assault does not require proof of an intent to commit murder. See *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999) (felonious assault requires proof of an assault with a dangerous weapon with the intent to injure or to place the victim in reasonable apprehension of an immediate battery). However, the trial court obviously misspoke, but it nonetheless appears that the failure to establish the requisite “intent” formed the basis of its observations concerning the felonious assault charge. We cannot agree that the trial court was expressing that there was insufficient evidence showing that an assault was accomplished directly through defendant’s use of the knife against the victim.

Furthermore, the fact that the jury acquitted defendant of felonious assault does not mean that the jurors found that defendant did not assault the victim with a knife for purposes of that particular charge, as the jury might have concluded that there was a failure to show the requisite intent. We can only speculate with respect to the reasoning behind the jury’s verdict. And, regardless, “the scoring of the guidelines need not be consistent with the jury verdict.” *People v Perez*, 255 Mich App 703, 712; 662 NW2d 446 (2003), vacated in part on other grounds 469 Mich 415 (2003); see also *People v Ratkov (After Remand)*, 201 Mich App 123, 126; 505 NW2d 886 (1993) (“Because the prosecution must prove controverted factual assertions underlying the scoring of the sentencing guidelines by a preponderance of the evidence rather than beyond a reasonable doubt, situations may arise wherein although the factfinder declined to find a fact proven beyond a reasonable doubt for purposes of conviction, the same fact may be found by a preponderance of the evidence for purposes of sentencing.”). Moreover, the jury may have found, with respect to the convictions on the two CSC I charges, that defendant was armed with the knife in accomplishing the sexual assaults.

With respect to the trial court’s 10-point score on OV 1 pursuant to § 31(1)(d), the parties both agree that the ruling constituted error. Consistent with the position of both the prosecutor and defendant on appeal, a score of 10 points under MCL 777.31(1)(d) cannot be based on the aggravated use of a knife, given that § 31(1)(d) pertains to “any *other* type of weapon” (emphasis added) and that the preceding provision, § 31(1)(c) (15 points), concerns firearms, knives, or other cutting or stabbing weapons. Accordingly, a score of 10 points under § 31(1)(d) cannot be based on a firearm, knife, or cutting or stabbing weapon, as they would not constitute, by necessity, any “other” type of weapon. Again, the parties are in complete agreement on that proposition. Given that a knife formed the basis of the court’s ruling, the score of 10 points was in error.

Removing from consideration § 31(1)(d) and the 10-point score, there is consensus that a weapon was displayed, which would provide support for an OV I score of 5 points under § 31(1)(e). However, as argued by the prosecution, MCL 777.31(1) mandates that the assignment of points by the court for OV I be based on the criteria that results in “the highest number of points[.]” As such, the prosecution contends that 15 points is the appropriate score under § 31(1)(c), which is implicated where “the victim had a reasonable apprehension of an immediate battery when threatened with a knife” We conclude that the trial court made factual findings consistent with § 31(1)(c), despite attributing an incorrect score on the basis of those findings, and we further hold that there was evidence to support a score of 15 points on OV 1, which ultimately has no impact on the minimum sentence range employed by the trial court.

As reflected above, the trial court indicated its agreement with the prosecutor's argument that the proofs at trial established that defendant pulled out a knife and threatened the victim with it, which event had to have pertained to the act supplying the basis for the felonious assault charge, given that the only other use of the knife was against the victim's cat and not to threaten the victim directly. The victim had no apprehension of an immediate battery; it was the cat that was being threatened with a battery through use of the knife. With respect to use of the knife following the sexual acts, the victim did testify that defendant threw her on the bed "and put the knife to [her] chest[.]" threatening to kill her. This clearly supports a score of 15 points pursuant to § 31(1)(c). It is true that the trial court, after stating that it agreed with the prosecutor's argument that the evidence established that defendant pulled out a knife and threatened the victim with it, indicated "that the proofs were pretty clear that there was a knife that was involved throughout the *sexual assault*." (Emphasis added.) Again, there was no evidence showing that the victim was threatened with a knife or had a reasonable apprehension of an immediate battery by way of the knife in relationship to the acts of sexual intercourse. However, we find it abundantly clear that the trial court's reference to use of the knife "throughout the sexual assault" was intended to mean and encompass the use of the knife throughout the entire transaction, including the period after the sexual acts were technically completed. This is the only logical conclusion, given that the court agreed with the prosecutor that the proofs at trial established that defendant pulled out a knife and threatened her with it, which, again, could only have pertained to the victim's testimony of defendant putting a knife to her chest after the sexual acts ended.

Affirmed.

/s/ William B. Murphy
/s/ Henry William Saad
/s/ Deborah A. Servitto